Chugach Alaska
CORPORATION

December 13, 2001

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Mr. Randy Bates
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Comments on October 1, 2001 Draft Proposed Alaska Coastal Management Program (ACMP) Implementation Regulations (6 AAC 50).

Via: Facsimile (907) 465-3075 and regular mail

Dear Mr. Bates:

These comments on the above-referenced proposed implementation regulations (the "proposed ACMP regulations") are submitted on behalf of Chugach Alaska Corporation ("CAC"), the Alaska Native Regional Corporation for the Chugach region established pursuant to the Alaska Native Claims Settlement Act of 1971, as amended, 43 U.S.C. § 1601, et seq. ("ANCSA"). CAC owns or has valid selection rights to over 930,000 acres of surface estate, subsurface estate and oil and gas rights within the Chugach Region, which stretches from the outer Kenai Coast to Icy Bay along the Gulf Coast near Yakatat. In addition to ANCSA, CAC's rights with respect to its lands are governed by the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 3101, et seq. ("ANILCA"), and the 1982 Chugach Natives, Incorporated Settlement Agreement ("1982 CNI Settlement").

Most of CAC's economically viable lands are within coastal zones subject to the proposed ACMP regulations. For this reason, the proposed regulations have an enormous impact on virtually any projects CAC contemplates on its lands. It is imperative that the proposed regulations codify the original intent of the legislature and avoid creating an additional regulatory structure that is both contrary to the intent of the legislature and in conflict with current statute.

CAC appreciates the significant time and effort that the DGC staff has invested in this rule-making process. However, after carefully reviewing the draft, it is readily apparent that significant changes should occur prior to codification of these procedures in order to make them as useful as possible to permittees and the state while ensuring a comprehensive project review procedure and optimal stewardship practices. As these are procedural regulations intended to streamline permitting and provide for an orderly, predictable, and fair permitting process, we

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think it is incumbent on the Governor's Office to insure that these most basic provisos are met in the ensuing codification. It is a certainty that these regulations will be dissected in a court of law at some point in the future. Ridding the draft regulations of ambiguities, unnecessary duplicitous reviews, permit conditions that agencies have no authority to enforce, and undefined timelines will do much to clarify the regulations prior to their day in court. With that in mind, please carefully consider our following comments that speak generally to several problem areas within the proposed regulations.

The regulations lack reliable, consistent, and predictable timelines for consistency determination.

As currently drafted, the rules contain too many exceptions and loopholes that either stop the clock entirely or allow the schedule to be sequentially extended. Because the coordinating agency can unilaterally modify the schedule at nearly every step, the applicant is left with no meaningful ability to predict the amount of time that will be needed to complete the process.

Since it was the intent of the legislature to provide for streamlined permitting and a predictable process for project start-ups, the proposed regulations should contain clear timelines for determination of completeness, publication of required public notices that start the review clock, and petition and elevation processes.

As the proposed regulations are now drafted, participants in the ACMP process are unable to make a reliable educated estimate as to "How long will it take to obtain a consistency determination?" If one were to try to develop a time series flow chart of the review process as currently drafted, no clear series would emerge; there are simply too many uncertainties in the draft regulations. Now is the time for DGC to reduce those uncertainties, before the regulations are codified into statute.

The proposed regulations are meant to provide flexibility and encourage consensus-building. While flexible rules allow for negotiated agreements on unique projects, the true test of efficiency and predictability occurs when a complex project becomes controversial. In today's world, we can expect virtually all projects to become controversial. For consensus building to work in these cases, definite deadlines must be established and responsibility clearly assigned. A definite start date and a predictable schedule will help create an efficient and fair process in all cases.

Alternative Measures, as defined and implemented in the proposed regulations, may impose unenforceable measures on permitting agencies and change the role of DGC from that of coordinator to that of regulator.

The proposed regulations require that consistency determinations "include any alternative measure determined to be necessary to ensure the project is consistent with an enforceable policy." 6 AAC 50.260(g)(2). State resource agencies, in turn, must incorporate those alternative measures attached to a consistency determination into the agency authorizations required for the project, whether or not that agency has the authority to impose said alternative measures. 6 AAC 50.260(g)(5); 6 AAC 50.275(b). This prevents the resource agencies from issuing any permits or

authorizations prior to receiving a final consistency determination and forces those agencies to accept permit conditions that may be outside of the scope of the permit(s) they intend to issue. This clearly creates a new level of regulation that neither the legislature contemplated nor authorized so that DGC may force the adoption of conditions no agency is authorized to impose by attaching the conditions to other state permits. The proposed regulations effectively convert a consistency determination into a "permit" process that the Legislature clearly intended to avoid. The role of the DGC is to ensure that projects are consistent with existing agency regulation and to coordinate between those agencies so as to minimize redundancy and streamline the process. We strongly urge you to remove reference to alternative measures altogether and, instead, rely on the resource agencies to provide permit conditions for particular projects based on their professional knowledge and authority. It is the responsibility of the legislature to give the DGC additional regulatory authorities. As of this date, the legislature has provided the DGC with no authority to stipulate alternative measures.

The proposed regulations fail to clarify applicability and scope of ACMP regulations by including multiple definitions with different meanings, vague and conflicting direction regarding scope, and conflicting statements within the regulations themselves.

The proposed regulations lack clarity in both applicability and scope in numerous provisions, setting forth different standards for applicability that is confusing and unnecessary. For example, the proposed regulations address applicability in four different sections using different language. Subsections 50.025, 50.200, and 50.230 should be eliminated and applicability should be addressed only in subsection 50.005.

Applicability and scope should be defined by the following criteria. First, consistency reviews should only be required when the project is located within the defined boundaries of a coastal zone. Second, the scope of the review should be limited to only those activities on the C-List. Finally, only those activities which have a "direct and significant impact" to any "coastal use or resource" should be reviewed. Both federal and state statute support use of the "direct and significant impact" standard.

Federal law governing the scope of state programs clearly limits the applicability of the CZMA and defines the coastal zone as extending inland "only to the extent necessary to control shore lands, the uses of which *have a direct and significant impact* on the coastal waters ..." 28 U.S.C. § 1453(1). The CZMA requires that state management programs include "a definition of what shall constitute permissible land uses and water uses within the coastal zone *which have a direct and significant impact* on the coastal waters." 28 U.S.C. § 1455(d)(2)(B) (emphasis added).

We note the inclusion of language limiting consistency reviews to projects subject to "a state agency authorization identified under 6 AAC 50.750" as a significant improvement to the proposed regulations. This reference to activities specifically identified on the "C" list will reduce ambiguity, provide clearer notice, and avoid unnecessary litigation concerning when a consistency review may be required. Nevertheless, the applicability standard contained in this subsection 50.005 is significantly broader and less certain than was intended by the Alaska Legislature when it enacted the ACMP. As indicated by the statutory language, the Legislature

intended the Program to address "direct and significant impacts" upon coastal resources rather than every activity that "*may affect* any coastal use or resource" (50.005(a)) or every activity that "*may have* a reasonably foreseeable direct or *indirect effect* on any coastal uses or resources," (50.750(a)). As currently drafted, the regulations invite needless controversy and unmeasurable criteria for determining what is and what is not affected. We urge the DGC to limit the applicability of its review process to only those direct and significant impacts intended by the legislature. The Coastal Management Act defines a "use of direct and significant impact" at AS 46.40.210(7). Consistent with the legislative intent, this should be the applicability standard.

Proposed elevation and petition processes are cumbersome and needlessly confusing.

The elevation and petition processes addressed in the proposed regulations, and the interplay between the two, are areas of significant and unnecessary confusion. In particular, the two levels of elevation create a great deal of confusion and take substantial, but yet uncertain, time. It does not appear that there is much to be gained by a two-tiered elevation process. The director-level elevation should be eliminated as the director is normally involved in controversial projects without the need for formal elevation. A request for the director's participation in the proposed consistency determination can be made by staff or through public comment without the need for a formal elevation. This will shorten the process and provide more predictability for applicants. It will also eliminate the need for a petitioner to effectively submit its petition twice. This change alone will greatly simplify the process.

Specified procedures for conducting elevation meetings and petition hearings are absent from the proposed regulations. It is not clear whether elevation proceedings are to occur on the record or whether new evidence can be presented. It is also not clear how evidence is to be submitted or what standards apply to those submissions. The proposed elevation rules allow any person to participate in the agency meeting that is the core of the elevation process. It is not appropriate to allow any person other than the petitioner and agency personnel to directly participate at a point when the public comment period has long since ended. We suggest that the proposed regulations be modified to provide for open attendance at the elevation meeting but to limit participation to the petitioner, the resource agencies, the project applicant, and the affected coastal districts

A major area of inconsistency arises in the petition process. The proposed regulations allow the coordinating agency to reject a petition within five days after a notice of petition is submitted, and again within five days after the petition document is submitted. 6 AAC 50.630(a). However, the criteria for rejection relate only to the notice of petition, not the petition document. 6 AAC 50.630(b). The proposed regulations do not indicate what procedures may be used to demonstrate standing if the required petition documents are not provided. This inconsistency needs to be corrected prior to adoption of the proposed regulations.

Conclusion

CAC appreciates the opportunity to comment on the proposed procedural regulations. We also recognize the hard work that your agency has thus far devoted to development of the proposed

regulations. As a party that will certainly be subject to these regulations in the near future, we are keenly aware of and sensitive to the impact of permitting delays and their associated costs. Given increasingly restrictive timing windows for on-the-ground activities, an unforeseen delay of even slight duration can take a project off the table for a year or longer. Changes to the proposed regulations that result in reliable timelines and unambiguous language can only serve all of us better. DGC, in its role as agency permitting coordinator under ACMP, must refrain from assuming regulatory authority not granted it by the legislature, and instead ensure that an efficient and effective ACMP process is in place in the final draft of the proposed regulations.

Thank you for your consideration of CAC's comments.

Sincerely,

Rick Rogers, Vice President
Lands, Resources and Tourism